
U.S. Department of Labor
Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

ARB CASE NO. 96-087
ALJ CASE NO. 88-ERA-33
DATE: November 10, 1997

In the Matter of:

CASEY RUUD,
COMPLAINANT,

v.

WESTINGHOUSE HANFORD COMPANY,
RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

DECISION AND ORDER OF REMAND

This complaint was brought by Casey Ruud against Respondent Westinghouse Hanford Company (WHC or Westinghouse) under the employee protection (whistleblower) provisions of the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. §5851 (1994), the Toxic Substances Control Act (TSCA), 15 U.S.C. §2622 (1994), the Clean Air Act (CAA), 42 U.S.C. §7622 (1994), the Solid Waste Disposal Act (SWDA), 42 U.S.C. §6971 (1994), the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §9610 (1994), the Safe Drinking

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Water Act (SDWA), 42 U.S.C. §300j-9(i) (1994) and the Federal Water Pollution Control Act or Clean Water Act (CWA), 33 U.S.C. §1367 (1994). Before the Board for review is the Recommended Decision and Order (R. D. and O.) issued on March 15, 1996, by the Administrative Law Judge (ALJ). In disposition, we decline to approve the parties' proposed settlement, we adopt many of the ALJ's findings and we remand the case to the

ALJ for further proceedings regarding a specific portion of the complaint and appropriate relief.

BACKGROUND

A. *Procedural history*

Ruud filed the complaint in February 1988, alleging that WHC and a predecessor contractor retaliated against him because he had engaged in protected activity. The protected activity and retaliation occurred between 1986 and 1988, culminating in Ruud's being laid off in February 1988 and passed over for recall thereafter. In July and August 1988, the parties agreed to settle the complaint, but no settlement agreement was submitted to the ALJ or the Secretary of Labor for approval. A number of the statutes under which the complaint is brought provide expressly that any settlement of a complaint must be "entered into" by the Secretary and the alleged violator with the "participation and consent" of the complainant.[1] *See, e.g.,* 42 U.S.C. §300j-9(i)(2)(B)(i). This language has been construed as mandating "a consensual settlement process involving all three parties." *Macktal v. Secretary of Labor,* 923 F.2d 1150, 1154 (5th Cir. 1991). By regulation, the Secretary (now the Board) does not participate preliminarily, permitting "the complainant and the company to negotiate the initial terms of a settlement. Once they have reached agreement, then [the Board] may consent to the agreement if it protects the interests of the public and the complainant." *Id.* at 1156. In 1990, the Secretary directed the parties to submit the terms of settlement. WHC expressly declined.[2] No response was received from Ruud. In late 1990 and early 1991, WHC managers allegedly continued to retaliate against Ruud because of the previous protected activity. Unable to approve or "consent to" the parties' settlement without reviewing the terms, the Secretary remanded the complaint to an ALJ for a hearing. The parties belatedly revealed the terms of settlement to the ALJ. Ruud now argues that the settlement is void because the bargaining process was impaired. A hearing was held in August 1995, and the record was held open thereafter for receipt of additional evidence.

The ALJ has recommended that the parties' settlement agreement, as modified in August 1988, be approved. In the alternative, the ALJ has found most of the complaint to be meritorious including the portion alleging retaliation in 1990 and 1991, which was not subject to the 1988 settlement. The ALJ found Ruud to be a highly credible, "objective" and "truthful" witness -- "a concerned person who is

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willing to risk his career and livelihood to report serious environmental and safety problems." R. D. and O. at 88 and n.8. In finding animus on the part of WHC, the ALJ cited as a consideration Ruud's "high credibility." *Id.* The ALJ found certain WHC witnesses to be less credible.[3] The ALJ also found that "[t]he heavy sarcasm, apparently infectious among WHC managers, is a hallmark of their attitude toward Ruud." *Id.* at 87.

B. *Facts*

On October 22, 1987, and May 11, 1988, Ruud and a co-worker, James Simpkin, testified in Washington, D.C., before the United States House of Representatives Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, at the request of the subcommittee. The 1987 hearings concerned inadequacies in environmental, public health, safety and quality assurance programs at Department of Energy (DOE) nuclear weapons facilities, including the Hanford, Washington, nuclear reservation (Hanford reservation) where Simpkin and Ruud were employed.[4] The 1988 hearings concerned retaliation by WHC against witnesses who had testified at the 1987 hearings, including Simpkin and Ruud. *See* Complainant's Exhibit (CX) 10 (transcript of subcommittee hearings). In February 1988, Ruud filed the instant Department of Labor (DOL) complaint of unlawful discrimination alleging that he had been laid off and refused reemployment because of environmental, quality assurance and safety and health complaints, the congressional testimony and cooperation with the subcommittee.[5] In late May 1988, the DOL found Ruud's complaint to be meritorious and ordered him reinstated with back pay. CX 44.

Ruud engaged in a number of protected activities at the Hanford reservation. As a lead auditor, he raised concerns that "inspectors [were] not properly certified on safety class equipment [and] that the actual construction or fabrication of the components was faulty in that welds were smaller than they should have been." R. D. and O. at 5. Ruud also raised concerns about unsafe designs and quality assurance, environmental and radiological requirements and conditions. *See id.* at 5-9. When contractors at the Hanford reservation consistently ignored stop work recommendations, Ruud contacted the media. The congressional subcommittee elicited information about Ruud's concerns. The subcommittee summarized one of the incidents as follows:

> On March 7, 1985 Governor Booth Gardner of Washington State toured the Hanford facility. . . . Unknown to him and his party,[[6]] radiation warning signs were deliberately taken down by [a contractor] along his route so that he would not find out that a major contamination accident had occurred. While senior . . . management officials were found to have been

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> involved, and the [contractor's] general manager later acknowledged that he had been told of the episode shortly after it occurred but failed to follow up, the DOE characterized the episode as an "aberration." One must inquire how much the Governor of the State of Washington was radiated through the kindness and hospitality of the Federal Government and its contractors.

CX 10 at 2-3. *See* R. D. and O. at 6. The ALJ found that WHC retaliated against Ruud by assigning him to provide extensive information within an unrealistically abbreviated time frame, failing to select him for the position of temporary auditor at the N-Reactor and failing to select him for a permanent senior quality assurance engineer position. The parties agreed to settle this portion of the complaint in mid-1988. *See* discussion *infra.* A term of the settlement prohibited interference with Ruud's prospective employment.

The ALJ also found that in 1990 and early 1991 WHC's general counsel retaliated against Ruud at the Aiken, South Carolina, Savannah River nuclear facility operated by the Westinghouse Savannah River Company (WSRC) under contract with the DOE. The retaliation entailed harassment, blacklisting and constructive discharge.[7] Ruud worked for RI-TECH, a contractor, as an instructional technologist developing, and offering instruction in, environmental regulations. RI-TECH provided the services of subcontractors such as Ruud to various customers, including the DOE and WSRC. Henry Wiedrich, the president of RI-TECH, initially advised Ruud that the duration of employment would be at least five years assuming "good performance and . . . ability to produce good quality work." Hearing Transcript (T.) 296. Ruud was engaged to train auditors and inspectors. Three managers formerly employed at the Hanford reservation (WHC) were working in South Carolina at that time, including WHC general counsel Joseph Wise who then was employed by WSRC as general counsel.[8]

In June 1990, the WSRC legal department directed RI-TECH to remove Ruud from the position of instructor of training programs. Ruud testified: "I was not allowed access onto the site, unless I was escorted by a Westinghouse employee, which was unique unto myself, because all the other RI-TECH employees had badges and authority to go on site for whatever needs they had, and I did not." T. 298. In August 1990, WSRC directed that both Ruud and Simpkin, who also was employed by RI-TECH, be removed and their contracts terminated, because they had engaged in whistleblowing activities at the Hanford reservation. The ALJ stated: "Wiedrich testified that it was ridiculous that Ruud and Simpkin could not visit the plant without an escort, and that a class Ruud was scheduled to teach had been canceled." R. D. and O. at 70. Wiedrich did not accede to WSRC's order at that time. On January 9, 1991, WSRC directed Ruud to remove himself physically from the Savannah River facility within a five-minute period or face removal by armed security guards. T. 298-302; CX 90. "An armed security guard [eventually] escorted Ruud off the site. . . . Wiedrich said that it was very unusual

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that Ruud was escorted off the site because his contract had expired."[9] R. D. and O. at 70.

General counsel Wise was responsible for the adverse employment actions. R. D. and O. at 22-23, 91-92; T. 302; CX 152 at 44-54. Wise initially had been surprised and upset to learn that Ruud was employed at the facility and moved to eliminate instructional responsibilities and to restrict access. Upon discovering Ruud's continued presence, Wise ordered physical removal and barred Ruud from the facility. David Grotyohann, the quality control manager for a contractor at the Savannah River facility, testified about a telephone call received from Wise and Jon Samuels, a WSRC security manager. Samuels requested the status of Ruud's contract and stated that they had discovered Ruud's presence at the facility and were "going to go get him or go find him or do something." Regardless of the precise phrasing, Grotyohann understood that "they were going to take some action at that time." CX 150A at 32-33, 61-62. Samuels confirmed this testimony. CX 152 at 44-54. When interviewed by a WSRC employee concerns program

representative, Grotyohann commented that he "hate[d] to see [Westinghouse] get hung for the stupid moves of a few people" namely Samuels and Wise. CX 150A, Attachment 1, page 000011; CX 153 at 45.[10] The ALJ found that former WHC president Jacobi, who alone was authorized to approve any settlement offers and who ultimately bore responsibility for the 1988 settlement agreement, harbored animus against Ruud and joined Wise in "forc[ing] Ruud out of his job with . . . RI-TECH at WSRC." R. D. and O. at 92, 93. The record shows that Ruud was "ordered off" as instructor at a GOCO seminar and that Jacobi managed the GOCO. R. D. and O. at 69-70; CX 148 at 59-61, 73 (Wiedrich).

Grotyohann testified about a conversation with Mary Dodgen, Ruud's WSRC supervisor with whom Jacobi maintained contact: "I believe what Mary had said that [Jacobi] did not want [Ruud] on the contract . . . and we were told to take all the subcontractors off then." CX 150A at 39. *See* R. D. and O. at 71-72. The change "cost time" and caused trouble contractually since it required contract revisions and necessitated arranging for WSRC instructors to provide the training. The substitution required WSRC instructors to work considerable overtime. CX 150A at 49. Grotyohann testified that at the time that the subcontractors were taken off the contract, he was led to believe that the decision was part of a "logical sequence," that "we wanted Westinghouse people teaching Westinghouse people. That was the logic and I didn't have a problem with that logic." *Id.* at 58. On the other hand, the contract covered instruction for both Westinghouse and DOE auditors and inspectors, and Grotyohann questioned "why would you use Westinghouse people to teach DOE people to basically write up Westinghouse people." *Id.* at 112. He testified further: "And I remember someone made the comment, Can you imagine if the press gets that one.' I mean . . . Westinghouse is teaching DOE how to audit Westinghouse. . . . I know they were trying to evaluate would there be a legal issue [in] doing something like this." *Id.* at 112-113.

Grotyohann was unequivocal that Ruud was the "trigger" for the decision to eliminate the subcontractors. He testified: "When the [list of instructors] was out with [Ruud's] name on it, that was the trigger saying, Get them off. We're going to put Westinghouse people on.'" CX 150A at 106. On the subject of Jacobi's intent, Grotyohann testified: "I actually never put two and two together until just recently." *Id.* at 57-58. In retrospect, Grotyohann realized that the other subcontractors were stigmatized in order to justify excluding Ruud. According to Grotyohann another subcontractor commented to him that "if it wasn't for Casey [Ruud], we'd probably . . . be able to transition over to [other jobs] quickly but now it's not that easy." *Id.* at 105. Grotyohann testified that the "understanding within the department was when Casey was done he was done. That was it. There would be no more work for Casey and those other two people. And the reason was because of the Casey situation." *Id.* at 105-106. The ALJ credited the testimony of Wiedrich and Grotyohann. R. D. and O. at 91-92.

Ruud testified that Wiedrich "told [him] that it was clear that it was because [he, Ruud] was a whistleblower at Hanford and that there was nothing he [Wiedrich] could do about that, because if he pushed it, they would just go after their whole contract." T. 300. *See* T. 301 (Ruud testified that a congressional subcommittee investigator "said that it was clear that . . . I had been retaliated against because . . . I was a whistleblower at Hanford"). Being unable "to perform the services committed to," Ruud resigned his employment. CX 90, CX 92. Ruud argues that Wise's retaliation at Savannah River demonstrated that Wise (and WHC) never intended to abide by the 1988 agreement not to interfere with Ruud's prospective employment and thus engaged in fraud in entering into the agreement.

C. *The terms of settlement at Westinghouse Hanford*

In mid-1988, the parties signed agreements to settle the portion of the complaint alleging retaliation at the Hanford reservation (1986-1988).[11] The original agreement, dated July 25, 1988, contained a "gag" or "muzzle" provision which violated public policy and constituted unlawful adverse action. *Connecticut Light & Power Company v. Secretary, U.S. Dep't of Labor,* 1996 U.S. App. LEXIS 12583, at *15 (2d Cir. May 31, 1996) (employer engaged in unlawful discrimination by restricting complainant's ability to provide regulatory agencies with information; improper "gag" provision constituted adverse employment action). *See Marthin v. TAD Technical Services Corp.,* Case Nos. 94-WPC-1/2/3, Sec. Ord., June 8, 1994; *Porter v. Brown & Root, Inc. and Texas Utilities,* Case No. 91-ERA-4, Sec. Rem. Ord., Feb. 25, 1994, slip op. at 8-11; *Corder v. Bechtel Energy Corp.,* Case No. 88-ERA-9, Sec. Ord., Feb. 9, 1994, slip op. at 5-8. The provision included the following language:

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> *Ruud agrees not to make further additional remarks or comments, either verbally or in writing, concerning his employment at Westinghouse or concerning the safety of operations at Westinghouse to anyone* provided that if Ruud is subpoenaed by a court, administrative body, or congressional committee or subcommittee or similar entity under force of law, then the parties agree that Ruud may testify regarding his employment at Westinghouse or concerning the safety of operations at Westinghouse.

CX 57 at 2, par. 7 (emphasis added).[12]

Ruud testified that throughout settlement negotiations WHC insisted that he agree to remain silent about the environmental, quality and safety issues that he and Simpkin had raised. Ruud testified: "They wanted me to be quiet. . . . They did not want us to raise any more issues about Westinghouse and Hanford safety and environmental kinds of issues, publicly." T. 253. Ruud also testified: "And the other key thing was they wanted to make sure that I . . . would not discuss at any time in the future any issues related to Westinghouse or its operation of the Hanford site." T. 278. "[T]he condition was very clear in that . . . I would not be at any time speaking about Westinghouse issues at any time in the future." T. 245 (Ruud). Simpkin testified similarly that WHC's "primary concern was that we not speak to the public, not speak out on the issues . . . and that was

the premise for even continuing . . . any kind of negotiations." T. 595. In discussing Simpkin's testimony, the ALJ stated:

> Simpkin and Ruud had the same goal in the negotiations: if they were going to remain at Hanford, they should have meaningful jobs to help WHC to correct problems, rather than an adversarial relationship. WHC's primary concern was that Simpkin and Ruud not speak to the public on the issues. This was a prerequisite to continue negotiations.

R. D. and O. at 32.

At the request of the DOE, the unlawful language was deleted from the settlement agreement on August 8, 1988. The modified confidentiality provision states:

> The parties agree that the terms and conditions of this Settlement Agreement shall remain strictly confidential and shall not be disclosed to any other person. Should Ruud, or any person obtaining the information from or by reason of Ruud's action, disclose any term or condition of this Settlement Agreement to any other person, then . . . all payments due Ruud under this Settlement Agreement shall cease and not thereafter be payable by any party.

CX 60. As modified, the language of the confidentiality provision is not objectionable. *See Macktal v. Secretary of Labor,* 923 F.2d at 1153-1154; *Thompson v. U.S. Dep't of Labor,* 885 F.2d 551, 556 (9th Cir. 1989); *Fuchko and Yunker v. Georgia Power Co.,* Case Nos. 89-ERA-9/10, Sec. Ord., Mar. 23, 1989, slip op. at 1-2. Ruud cites the confidentiality provision in arguing that WHC never intended to comply with the agreement as evidenced by a subsequent breach. *See* CX 63. Specifically, on September 1, 1988, Larry McCormack, WHC's senior labor counsel, provided the DOE chief counsel with a copy of the agreement in order to appease a congressman who was "demanding the document." McCormack stated that he believed that he had violated the confidentiality provision by releasing the agreement and was "complying with the demand under protest."

The modified agreement also contains a provision captioned "Personnel File." Ruud's intent in including this provision was to ensure that WHC would not interfere with prospective employment. The provision states:

> The parties agree that all personnel files maintained by Westinghouse regarding the employment of Ruud shall state that the reason for termination of his employment was consistent with a general reduction in work force. Any and all negative comments, file memos or other documents with respect to Ruud's employment with Westinghouse shall be purged from his personnel file or files. *In the event that any prospective employer of Ruud requires or requests verbal recommendations from Westinghouse, said verbal recommendations shall be of at least a neutral tone and quality.* Ruud or his legal representative shall be entitled

> to review any and all personnel files or records maintained by Westinghouse regarding his employment on a regular, periodic basis. Westinghouse shall prepare and place in Ruud's file a "neutral" letter of recommendation for further employment on Ruud's behalf.

CX 60 at 2, par. 6 (emphasis added).

Signed by James Cassady, WHC's human resources director, the letter of recommendation subsequently placed in Ruud's personnel file states that Ruud was hired in April 1985 as a quality assurance engineer to perform audits; that in April 1987 Ruud was assigned to the Basalt Waste Isolation Project (BWIP);[13] that after the BWIP was canceled by the United States Congress, Ruud and several hundred other employees were placed in a reduction in force status; and that Ruud's position was eliminated in February 1988. CX 58. Ruud testified that "[t]he purpose of th[e] provision was to ensure that Westinghouse didn't do anything negative towards [his] employment." T. 288-289. Simpkin testified that the nuclear "industry is not that big, and once [the] message gets out . . . and they start giving negative information, it doesn't really work very well in this industry." T. 596-597. Cassady testified that Ruud requested a

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neutral letter of reference "[s]o that if anyone was checking back in on him . . . they wouldn't get anything negative about his being employed there." T. 147-148. McCormack, who negotiated the settlement and signed the agreement as WHC's representative, "assured Ruud that WHC would not do anything to get in the way of his future employment." R. D. and O. at 20.

Ruud contends that the settlement agreement should be disapproved because it was obtained by misrepresentation, duress and undue influence. In particular, Ruud contends that (1) he was coerced into settling the complaint because of falsehoods concerning the settlement negotiations intentionally advanced by WHC to the media and to Congress which discredited him and (2) WHC never intended to abide by the "Personnel File" provision in the settlement agreement as evidenced by retaliation adversely affecting prospective employment at the Savannah River facility in 1990 and 1991. Ruud also contends that (3) WHC never intended to abide by the confidentiality provision as evidenced by a subsequent breach. Under item (1) above, Ruud contends that WHC withheld "his otherwise entitled employment" for purposes of exerting economic coercion. We agree with the ALJ, R. D. and O. at 77, that the economic distress and financial hardship resulting from an employer's unlawful conduct generally are not grounds for invalidating a settlement agreement, and we reject Ruud's argument to the contrary. *See Macktal v. Secretary of Labor,* 923 F.2d at 1156 n.26, *citing Jurgensen v. Fairfax County, Va.,* 745 F.2d 868, 889 (4th Cir. 1984); *Asberry v. United States Postal Service,* 692 F.2d 1378, 1381 (Fed. Cir. 1982).

DISCUSSION

I. Coverage

The ALJ found violations of the employee protection provisions of the CAA and the CERCLA. We adopt the ALJ's finding that Ruud established coverage under these laws. R. D. and O. at 82. The ALJ declined to find coverage under the SDWA which, unlike the CAA and CERCLA, provides for awards of exemplary damages. We disagree with this finding. Under the SDWA whistleblower provision, an employee is protected if he (1) commenced, caused to be commenced or is about to commence or cause to be commenced a proceeding under the subchapter or a proceeding for the administration or enforcement of drinking water regulations, (2) testified or is about to testify in any such proceeding, or (3) assisted or participated in any manner in such a proceeding or in any other action to carry out the purposes of the subchapter. 42 U.S.C. §300j-9(i).

The record shows that Ruud discussed leakage of nuclear waste into groundwater and the Columbia River during hearings convened by a subcommittee of the United States Congress and during meetings with congressional staff and consultants. R. D. and O. at 10, 83; T. 71-73; 101-104. Additionally, leakage and unauthorized disposal formed a basis for

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Ruud's "burial ground audit." R. D. and O. at 6-7; T. 71-73, 114-116; CX 9 at 49. By compiling and providing information about such contamination, Ruud participated or assisted in a proceeding or other action to promote safe drinking water. *Cf. Stone & Webster Engineering Corp. v. Herman,* 1997 U.S. App. LEXIS 16225, at *22 (11th Cir. July 2, 1997) (discussion about nuclear safety compliance during meeting with co-workers constituted an action to carry out purposes of Energy Reorganization Act; employee was protected where "expression has a public dimension and fits closely into an extended pattern of otherwise protected activity"). In focusing exclusively on the nature of Ruud's "concern," R. D. and O. at 83, the ALJ unduly limited coverage under the SDWA. Consideration of exemplary damages afforded by the SDWA therefore is appropriate.

II. Approval of the proposed settlement agreement

A settlement is a contract. Its construction and enforcement are dictated by principles of contract law. Parties enter into settlement agreements by means of the bargaining process. Settlement agreements are enforceable as long as the process is not impaired by misrepresentation, duress or undue influence. Agreements are voidable in two circumstances: (1) if a party has been influenced by improper pressure, *e.g.,* physical compulsion, threat or undue influence, or (2) a party has been induced by an assertion, either fraudulent or non-fraudulent but material, that is not in accord with existing facts. *See* Restatement (Second) of Contracts, Chapter 7 (1981). Since Ruud raises these challenges to the legitimacy of the bargaining process, we discuss them briefly. We disapprove the settlement on a separate ground, however.

Because of a "participation and consent" requirement, settlements under employee protection provisions are treated differently than other settlements. *But see Evans v. Jeff D.,* 475 U.S. 717, 726-727 (1986) (Fed. R. Civ. P. 23(e)) (class action settlements subject to court approval or rejection). The majority of the statutes involved here provide that upon receiving a complaint of unlawful discrimination, the Secretary (now the Board) shall either grant or deny relief "unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement *entered into* by the Secretary and the person alleged to have committed [the] violation . . . ." (Emphasis added.) These statutes also provide: "The Secretary may not *enter into* a settlement terminating a proceeding on a complaint without the participation and consent of the complainant." (Emphasis added.) The court in *Macktal v. Secretary of Labor,* 923 F.2d at 1153, concluded that "[o]nce a complaint is filed, the statutory language authorizes only three options: (1) an order granting relief; (2) an order denying relief; or (3) a consensual settlement involving all three parties."[14] The Secretary's approval demonstrates "consent to the settlement and achieves the consent of all three parties, as required by the statute[s]." *Id.* at 1154. Indeed, in rejecting the identical argument urged here by WHC -- that the Secretary

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forfeited jurisdiction once the parties moved for dismissal -- the *Macktal* court pointed to explicit statutory language: "The words of the statute require the Secretary to take one of three actions once a complaint is filed. The statute makes no exception for cases in which the complainant and the company reach an independent settlement." *Id.* (footnote omitted).

The Secretary's role in the process is to protect the public interest as well as that of complainant employees. *Id.* at 1156 and n.30. The court determined that complainant and employer were bound by an initial negotiated consent to settle the complaint until such time as the Secretary approved or rejected the settlement. Otherwise, the process would require a second affirmation of consent at the time of approval -- a step not required by statute. Binding the parties to the initial consent also permits the process to proceed expeditiously "without fear that one or the other parties will withdraw from the negotiated settlement before the Secretary can complete her review." *Id.* at 1157. Under the statutes, a complainant must both "participat[e]" in and "consent" to an agreement. Having done so, the complainant has provided consent. If the alleged violator similarly has agreed, the settlement is subject to approval by the Secretary regardless when the settlement is submitted.

Ruud contends that WHC's "duress or coercion" renders the agreement voidable. "If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim." Restatement (Second) of Contracts §175(1).[15] Here, Ruud was concerned with correcting environmental, quality assurance and public safety and health problems at the Hanford reservation. To that end, he assisted the congressional subcommittee and testified at subcommittee hearings. When WHC retaliated, Ruud filed a DOL complaint. WHC

threatened to "fight [him] to the end" and then falsely related the status of negotiations conducted to settle the complaint and impugned Ruud's motivation in order to discredit Ruud with the subcommittee and the DOL. Ruud contends that he was compelled to settle because the subcommittee and DOL no longer supported him in the complaint. Ruud was not dependent on these entities to proceed with the complaint, however, and at various stages of the negotiations, including at settlement, he was represented by counsel. Moreover, WHC's false account of the negotiations did not prevent Ruud from continuing to assist the subcommittee in correcting problems at the Hanford reservation. The settlement agreement is not voidable under this theory because of the alternatives to settlement that were available to Ruud.

Ruud also contends that WHC intentionally misrepresented its intent. In order for a settlement agreement to be voidable under this impairment, (1) there must have been a misrepresentation, *i.e.,* an assertion regarding settlement not in accord with the facts, (2) the misrepresentation must have been either fraudulent or material, (3) the

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misrepresentation must have induced the recipient to make the settlement agreement and (4) the recipient's reliance on the misrepresentation must have been justified. Ruud contends that WHC misrepresented one, its intent not to interfere with prospective employment and two, its intent to keep the agreement confidential. The asserted misrepresentations are reflected respectively in the "Personnel File" and "Confidentiality" provisions of the settlement agreement. Senior labor counsel McCormack's contemporaneous statement that WHC would not interfere with Ruud's prospective employment, Ruud contends, demonstrates the intent of the "Personnel File" provision. Ruud relies on the facts (1) that former WHC managers blacklisted, harassed and constructively discharged him three years after entering into the agreement and (2) that McCormack provided the DOE with a copy of the agreement two months after signing it to argue that WHC never intended to abide by these provisions.

A commitment not to interfere with prospective employment or not to reveal the terms of settlement implies a present intent not to do so. "A person's state of mind is a fact, and an assertion as to one's opinion or intention, including an intention to perform a promise, is a misrepresentation if the state of mind is other than as asserted." Restatement (Second) of Contracts §159(d). Section 171 comment (a) of the Restatement also provides that a statement of intention by the maker is an assertion of fact -- the "fact" being the maker's state of mind -- and it is a misrepresentation if that state of mind is not as asserted. "[T]he truth of a statement as to a person's intention depends on his intention *at the time that the statement is made* and is not affected if he subsequently, for any reason, changes his mind." (Emphasis added.) Accordingly, the issue is whether WHC intended to honor the settlement provisions at the time that it entered into the agreement.[16]

In order for an agreement to be voidable, any misrepresentations also must be fraudulent, or if nonfraudulent they must be material.[17] "A misrepresentation is fraudulent

if the maker intends his assertion to induce a party to manifest his assent and the maker ... knows or believes that the assertion is not in accord with the facts . . . ." Restatement (Second) of Contracts §162(1)(a). A fraudulent misrepresentation must be both consciously false and intended to mislead. "A misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent . . . ." *Id.* §162(2). The ALJ found no evidence of fraud. R. D. and O. at 76. We agree that, even assuming a threshold finding of misrepresentation, the record contains no evidence of fraud with regard to the confidentiality provision. As to materiality of that provision, the record shows, and the ALJ found, that "Complainant has repeatedly stated that he did not care about the confidentiality provision." *Id.* at 40. The provision likely did not induce Ruud to manifest assent and thus was not material. Accordingly, reliance on the confidentiality provision to establish impairment fails.

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The provision precluding interference with prospective employment *was* material, however. Ruud testified that the personnel file provision was essential to any agreement to settle the complaint. The ALJ found:

> During the negotiations, Ruud wanted to be assured that WHC would not be able to negatively influence Ruud's employment elsewhere. McCormack assured Ruud that WHC would not do anything to get in the way of his future employment. . . . Subsequently, Ruud accepted a job in the nuclear industry in South Carolina and relocated his family there. If he had known that Westinghouse was going to interfere with his employment in South Carolina or anywhere else in the future, he would not have signed the agreement.

Id. at 21. Ruud testified that after being constructively discharged at the Savannah River facility, "he realized that his career was being crushed, that everything he had worked for had come to an end, and that he could no longer be a contributor." *Id.* at 23. The provision meets both elements of the materiality criterion.

We find, regardless of materiality, that Ruud has not met the threshold burden of showing that, *at the time of settlement,* there was a misrepresentation as to the personnel file provision. With regard to McCormack, WHC's senior labor counsel, primary negotiator and signatory to the agreement, and WHC president Jacobi, who retained ultimate authority for approving the agreement, we do not find assertions "not in accord with the facts," *i.e.,* we do not find evidence that, at the time agreement was reached, either manager intended to renege on that term of settlement. The nature and extent of Wise's retaliation at the Savannah River facility gives us pause. As general counsel, Wise irrefutably represented WHC. "Wise understood that Ruud wanted the neutral letter of recommendation for future employment without interference from Westinghouse." R. D. and O. at 40. In examining Wise's state of mind at the time of WHC's settlement, however, we have not found evidence of a contemporaneous intent to renege, which leaves only the inference raised by the retaliation at Savannah River. Evidence of breach in the execution, by itself, generally is insufficient to prove fraud in the inducement.

Milwaukee Auction Galleries, Ltd. v. Chalk, 13 F.3d 1107, 1109 (7th Cir. 1994) (nonperformance of a promise is not enough to ground an inference that a defendant never intended to perform).[18] In these circumstances, we cannot say that Wise did not intend to abide by the agreement originally. The possibility remains that Wise intended to comply and, for whatever reason, changed his mind. We consequently agree with the ALJ that the 1988 settlement between Ruud and WHC is not voidable because of coercion or fraud in the inducement.

III. Rejection of the proposed settlement agreement

Apart from the issue of fraud, and germane to a separate issue of violation, record evidence shows that WHC breached the agreement by interfering with Ruud's prospective

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employment.[19] In particular, the ALJ found retaliation against Ruud in 1990 and 1991 during his tenure at the Savannah River facility, R. D. and O. at 90-92, which constituted a breach of the personnel file provision of the settlement agreement. The ALJ stated:

> I find that there were at least two acts of retaliation against Ruud at WSRC that are attributable to his whistleblowing activities at WHC. First, Complainant was prohibited from performing his duties training DOE personnel at the Savannah River site shortly after management there received copies of newspaper articles telling of Ruud's presence at WSRC and remarking on his past whistleblowing activities. This action against Ruud was taken because of his whistleblowing activities at WHC. No other reason has been suggested.
> Second, Complainant was summarily removed from the premises at WSRC under threat of force (he was given five minutes to get off the premises on orders by Wise, the General Counsel of WSRC, who had been General Counsel at WHC at the time of Ruud's whistleblowing activities there.) Wise's denial of culpability is not believable in light of the testimony of Ruud, Wiedrich, and Grotyohann that the order probably came from Wise in retaliation for Ruud's previous whistleblowing activities at WHC. The reason given for his expulsion was, in my view, transparently pretextual, because of the flimsiness of the "reason" and because of the animus that Wise and Jacobi harbored against Ruud -- animus that was remarked on by several people.

Id. at 91-92 (citations omitted).[20]

We decline to "enter into" a settlement when evidence shows that a material term has been breached. We are charged with "protect[ing] the interests of the public and the complainant." *Macktal v. Secretary of Labor,* 923 F.2d at 1156 and n.30 (Congress sought to "guarantee by statute that the employee's interests not be compromised [by settlement]"). Approval of a breached agreement would not ensure this protection. Ruud unambiguously sought to prevent interference with prospective employment. The personnel file provision of the agreement afforded such a guarantee. Evidence shows,

however, that in the end general counsel Wise and other WHC/WSRC managers did not hesitate to compel Ruud's (constructive) discharge. The settlement, as effectuated, thus was not fair, adequate and reasonable because it did not afford Ruud the benefit of a material term. We

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consequently decline to approve it.[21]

Alternatively, the subsequent adverse action against Ruud brings into question WHC's intent or understanding in agreeing to the personnel file provision. WHC possibly read the provision solely to refer to the content of personnel documents and references; whereas Ruud read it, reasonably we find, to prohibit WHC from interfering in any manner with prospective employment. Assuming such a misunderstanding, the parties did not agree on a material term of settlement and thus did not reach agreement. We would disapprove a proposed "settlement" under conditions where the necessary assent would be absent. *Leidigh v. Freightway Corp.,* Case No. 87-STA-12, Sec. Rem. Dec., Jan. 22, 1996 (order approving settlement vacated because parties apparently failed to agree on material term); *Saporito v. Arizona Public Service Group, The Atlantic Group, Inc.,* Case Nos. 92-ERA-30, 93-ERA-26/45, Sec. Ord., May 19, 1994 (settlement approval rescinded and case remanded where confusion existed as to scope of settlement and claims appeared unresolved).

IV. Findings of liability at the Hanford reservation

Having rejected the proposed settlement, we adopt most of the ALJ's alternate findings of liability at the Hanford reservation for the period 1986-1988, R. D. and O. at 85-90, as supported by the record. In October 1986, the contractor preceding WHC transferred Ruud to the BWIP (Basalt Waste Isolation Project) allegedly in retaliation for protected activity. We agree with the ALJ that WHC did not "ratify" the actions of this contractor and thus is not liable for the actions. In contrast, the ALJ found that WHC manager Blaine McGillicuddy, Ruud's immediate supervisor at the BWIP, intentionally and maliciously retaliated against Ruud because he cooperated with and testified before the Congressional subcommittee. The ALJ stated:

> McGillicuddy's testimony reveals that he did in fact retaliate against Ruud by sarcastically assigning him to provide extensive information within a short time concerning all "out-of-compliance" supplier quality assistance programs. The sarcasm dripping from the phrase, "it's tough being an authority" is ample support for my finding that McGillicuddy harbored a discriminatory animus. WHC acknowledges that relations between the two deteriorated after [the] October 1987 [hearings], but contends that this was caused by Ruud's "arrogance and insubordination." I find that the arrogance present here was mostly McGillicuddy's. Thus, Ruud has established an inference of retaliation.

Id. at 86 (citations omitted). The ALJ rejected WHC's proffered nondiscriminatory reason for the actions as pretextual.

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The ALJ found that WHC further retaliated against Ruud by rejecting him for the position of auditor at the N-reactor. The record fully supports this finding. As a basis, the ALJ cited a remark by a WHC manager to Ruud that " if, because of your notoriety with the subcommittee, other managers choose not to hire you, then that's just too bad.'" *Id.* at 87. The ALJ stated: "The heavy sarcasm, apparently infectious among WHC managers, is a hallmark of their attitude toward Ruud. Because the typicality of the remark is significant evidence of its authenticity, I find that the quotation is probably authentic and adds evidence of malice to the equation." *Id.* The ALJ similarly found WHC's proffered nondiscriminatory reason for this action to be pretextual.

The ALJ also found retaliatory WHC's refusal to employ Ruud as a senior quality assurance engineer, a position for which he was well qualified. The ALJ stated:

> There were at least two and possibly four quality assurance engineer positions available between the time when [Ruud] was laid off and May 11, 1988, when company officials were subpoenaed to testify before Congress. At least one of the individuals chosen for the position by [quality assurance] manager Robert Gelman subsequently resigned, but the position made vacant by the resignation was never offered to Ruud and was left vacant. Almost immediately after the Congressional hearing, [WHC] found two jobs for Ruud, but, after he accepted, WHC withdrew the offer unless Ruud agreed to drop all claims for retaliation against WHC.

Id. at 88. During the 1987 subcommittee hearings, Ruud had testified about Gelman's lack of qualifications. "[A]mple direct and circumstantial evidence" thus supported a finding of unlawful discrimination. *Id.* at 89. Finally, the ALJ rejected Ruud's argument that WHC failed to deal in good faith when negotiating the settlement after the 1988 subcommittee hearings. R. D. and O. at 90 ("tough negotiating does not equal bad faith retaliation"). We disagree to the extent that WHC premised negotiations on the unlawful "gag" provision which violated public policy and constituted adverse action. *Connecticut Light & Power Company v. Secretary, U.S. Dep't of Labor,* 1996 U.S. App. LEXIS 12583 (2d Cir. May 31, 1996).

V. The Savannah River allegations

The ALJ found that "[t]he corporate connection between WHC (the Hanford reservation) and WSRC (the Savannah River facility) is close enough to attribute the actions of one corporation to the other for purposes of whistleblower protection." R. D. and O. at 91. The record fully supports this finding. WSRC and WHC are wholly owned subsidiaries of Westinghouse Electric Corporation. The companies maintain separate employment benefit plans, but employees transfer from one company to another without termination of employment and application for reemployment. CX 135 at 18-19, 23. WSRC and WHC stock option plans provide for purchase of Westinghouse Electric

Corporation stock through the subsidiaries. *Id.* Thomas Anderson, a president of WHC, testified that the subsidiaries share

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employees on task team assignments: "[P]eople were used from Westinghouse Savannah River Company to provide assistance, perhaps participate on an investigative team at Westinghouse Hanford Company, and vice versa. It's a common practice." *Id.* at 32. Anderson previously was employed by WSRC as vice president and general manager of environment, safety, health and quality assurance. After leaving WHC, Anderson was employed by Westinghouse Electric Corporation as director of the energy systems business unit. *Id.* at 16-17, 45; CX 136 at 10-12. Wise similarly was employed by WHC, WSRC and Westinghouse Electric Corporation during his career. R. D. and O. at 39; CX 149. The ALJ noted that Anderson, Wise and McCormack, "important principals in this case," had served as "top executives at all three corporations," that WHC "did not seriously contest this point," and that "whistleblower protection extends to former employees as well as to present ones." R. D. and O. at 91; *Connecticut Light & Power Company v. Secretary, U.S. Dep't of Labor,* 1966 U.S. App. LEXIS at *11 (former employees protected). We adopt the ALJ's finding that the corporations commonly were liable for purposes of whistleblower discrimination in this case.

WHC argues that the ALJ's finding of liability at the Savannah River facility is unfair because the evidence establishing violation purportedly was introduced solely for purposes of showing misrepresentation in reaching the 1988 settlement agreement. To the contrary, introduction of this evidence was not so limited. T. 299, 676-678.[22] More importantly, however, breach of the agreement was integral to Ruud's acknowledged contention that WHC never intended to perform. Regardless that Ruud was unsuccessful in claiming that breach in the execution proves fraud in the inducement, breach of an agreement also can constitute a violation of the statutes. *Gillilan v. Tennessee Valley Authority,* Case Nos. 91-ERA-31/34, Sec. Dec., Aug. 28, 1995, slip op. at 9; *Blanch v. Northeast Nuclear Energy Co.,* Case No. 90-ERA-11, Sec. Ord., May 11, 1994, slip op. at 4; *O'Sullivan v. Northeast Nuclear Energy Co.,* Case No. 90-ERA-35, Sec. Ord., Dec. 10, 1990, slip op. at 3. WHC argues that the finding of liability should be rejected because Ruud did not file a separate discrimination complaint after the retaliation at Savannah River, and the complaint therefore was not legitimately before the ALJ. The ALJ addressed these considerations as follows:

> WHC does not suggest that harassment at WSRC in 1990 and 1991 is not independently actionable despite the fact that Complainant never attempted to amend the complaint to include these events. . . . However, because a complaint had already been filed in 1988, putting Respondent on notice of Ruud's allegations of discrimination generally, and because Respondent was clearly on notice by the time of the hearing that Ruud intended to pursue the Savannah River site allegations (*e.g., see* Complainant's trial brief at 19-26), there has been no

prejudice to WHC from failure to amend the complaint to note the South Carolina violations.

R. D. and O. at 94. WHC was on notice that the proceeding encompassed allegations of

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retaliation and violation at the Savannah River facility at least as of the date that Ruud filed prehearing lists of exhibits and witnesses and the prehearing brief. The lists feature proposed testimony and documentation from Savannah River personnel and the brief includes an eight-page discussion of the Savannah River facts in the contexts of misrepresentation (settlement issue) and violation (merits issue). Ruud advanced (1) the issue of misrepresentation as evidenced in part by general counsel Wise's animus at Savannah River and (2) the issues of animus, retaliation and violation at Savannah River in prehearing filings, at hearing and thereafter.[23]

At the hearing, Ruud testified that he was removed from his position as instructor at the Savannah River facility and denied unescorted access to the facility. WHC counsel objected and moved to strike "on relevancy grounds." Counsel stated: "There's -- it doesn't go to the issues of whether he was wrongfully terminated on February 29th, 1988, and it doesn't go to the issue of whether there is fraud in the inception of the settlement agreement. This is something that happened several years after the settlement agreement was entered into." The ALJ ruled the evidence relevant as tending to show animus. T. 298. By overruling the objection and denying the motion to strike, the ALJ permitted introduction of evidence of continued retaliation at the Savannah River facility, and consequently the complaint effectively was amended to conform to the evidence.[24]

Amendment of the pleadings to cause them to conform to the evidence and to raise unpleaded issues "may be made upon motion of any party at any time, even after judgment . . . ." In the event of a relevancy objection that the evidence "is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to [show] prejudice . . . ." Fed. R. Civ. P. 15(b). This mechanism applies here. In these circumstances, amendment is appropriate unless the opposing party can demonstrate prejudice. WHC has not shown that the introduction of this evidence was "so prejudicial that the detrimental effect cannot be cured by a continuance or the imposition of some other condition on allowing the amendment." 6A Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure §1491 (1990).

The "amendment" in this case technically constitutes a supplementation under Fed. R. Civ. P. 15(d) (supplemental pleadings bring the case up to date by "setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented") and 29 C.F.R. §18.5(e) (1997). The purpose of supplementation "is to promote as complete an adjudication of the dispute between the parties as is possible." 6A Wright, *et al.,* Federal Practice and Procedure §1504. *See Griffin v. County School Bd. of Prince Edward County,*

377 U.S. 218, 226-227 (1964) (claims, parties and events postdating original complaint but related to original action may be added to render pleadings "a means to achieve an orderly and fair administration of justice"). While *amended* pleadings generally incorporate matters occurring before the filing of the original pleading and replace the pleading in its entirety, *supplemental* pleadings address events subsequent to the original pleading and represent a continuation of that pleading. *Frank v. U.S. West, Inc.,* 3 F.3d 1357, 1365 (10th Cir. 1993). "Inasmuch as the discretion exercised by [a] court in deciding whether to grant leave to amend is similar to that exercised on a motion for leave to file a supplemental pleading, [a] court's inattention to the formal distinction between amendment and supplementation is of no consequence." 6A Wright, *et. al.,* Federal Practice and Procedure §1504. Standards for supplementation are the same as standards for amendment. *Picotti v. Community Child Care Center of Third Ward, Inc.,* 901 F. Supp. 588, 595 n.6 (W.D.N.Y. 1995). Supplementation should be freely permitted[25] absent a showing by the opposing party of undue delay, bad faith, dilatory motive or prejudice. *Cohen v. Reed,* 868 F. Supp. 489, 497 (E.D.N.Y. 1994); *Concerned Area Residents v. Southview Farm,* 834 F. Supp. 1410, 1412-1413 (W.D.N.Y. 1993).

We consider the retaliation at the Savannah River facility to constitute yet another instance of continued retaliation because of protected activity at the Hanford reservation and not a discrete, unrelated violation. In this respect, the Savannah River portion of the complaint meets the Rule 15(d) standard that the new allegations bear "some relationship" to the subject of the original complaint. *Keith v. Volpe,* 858 F.2d 467, 474 (9th Cir. 1988), *cert. denied sub nom. City of Hawthorne v. Wright,* 493 U.S. 813 (1989).[26] The original complaint alleged unlawful employment discrimination at the Hanford reservation because of Ruud's protected activity during his tenure there. The amendment to conform to the evidence alleges retaliation at Savannah River because of protected activity at the Hanford reservation, and serves to update the course of discrimination. *See Pratt v. Rowland,* 769 F. Supp. 1128, 1131 (N.D. Cal. 1991) (supplemental complaint alleging that prison officials continued history of retaliation against plaintiff inmate satisfied test that supplemental pleadings relate to subject of original action; supplemental complaint alleged continuing pattern and practice of politically motivated mistreatment of plaintiff, as did original complaint). *See also Concerned Area Residents v. Southview Farm,* 834 F. Supp. at 1413 (plaintiffs alleging Clean Water Act violations permitted to supplement complaint to add newly discovered violations related to previous claims; despite addition of new issues, defendant was not prejudiced because substance was not altered to any significant degree). Leave to supplement should be granted freely when additional facts connect the supplemental pleading to the original pleading, and such leave normally *is* granted when the opposing party is not prejudiced. *Quarantino v. Tiffany & Co.,* 71 F.3d 58, 66 (2d Cir. 1995); *Pratt v. Rowland,* 769 F. Supp. at 1131 (pleading was considered a supplemental complaint when it set forth continuing events).

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By overruling WHC's relevancy objection and denying its motion to strike, the ALJ essentially (and appropriately) amended the complaint to conform to the supplemental evidence.[27] The arguably "unpleaded" issue -- that the adverse employment actions at the Savannah River facility constituted a violation of the statutes for which WHC was liable -- should have been apparent to, and therefore defended against, by WHC. However, out of an abundance of caution, we remand the case to the ALJ to give WHC an additional opportunity to defend against the evidence of violation at Savannah River. *Cf. Yellow Freight System, Inc. v. Martin,* 954 F.2d 353, 358-359 (6th Cir. 1992) (the test is one of fairness under the circumstances; it must appear that the parties understood the evidence to be aimed at the unpleaded issue; evidence relevant to both pleaded and unpleaded issues is not presumed "to give the opposing party fair notice that the unpleaded issue is entering the case").

CONCLUSION

At this stage of the proceeding, we decline to adopt the finding of violation at the Savannah River facility and remand the complaint to the ALJ to accord WHC the opportunity to meet the evidence of continued retaliation. Rule 15(b), Fed. R. Civ. P., and 29 C.F.R. §18.43(c) (the court or ALJ "may grant a continuance to enable the objecting party to meet such evidence"). For purposes of clarity, we direct complainant to state for the record the basis for the portion of the complaint alleging retaliation at Savannah River during 1990 and 1991 and the recovery requested. *See* Fed. R. Civ. P. 15(d) (court may permit party to serve supplemental pleading setting forth events which have occurred since date of pleading sought to be supplemented). With regard to the portion of the complaint alleging retaliation at the Hanford reservation between 1986 and 1988:

(1) We adopt the ALJ's finding that the actions of the predecessor contractor are not attributable to WHC (R. D. and O. at 85);

(2) We adopt the ALJ's findings of violation (R. D. and O. at 86-90), specifically the harassment of Ruud by Blaine McGillicuddy, the failure to select Ruud for the position of temporary auditor at N-Reactor and the failure to select Ruud for permanent senior quality assurance engineer positions; (3) We find that WHC's original settlement agreement which contained the "gag" or "muzzle" provision violated public policy and constituted an unlawful adverse action;

(4) The ALJ is correct in finding that the record does not support the claim of illegal surveillance (R. D. and O. at 92);

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(5) We adopt the ALJ's findings on the issue of timeliness (R. D. and O. at 93-94). We decline to approve the settlement agreement. Respondent's motion to strike the portion of

the complaint alleging unlawful discrimination at the Savannah River facility is denied. On remand, the ALJ shall revisit the issue of appropriate relief, R. D. and O. at 95-97, based on his ultimate findings and in consideration of this decision. The ALJ is directed to avoid duplicative recovery. To this end, the ALJ may consider the motion to compel production of the state court settlement. The ALJ also shall award costs and expenses, including attorney fees, reasonably incurred in bringing the complaint.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member

[ENDNOTES]

[1] The Secretary has delegated approval authority for settlements under these statutes to this Board.

[2] WHC's senior labor counsel advised the Secretary: "The specific Settlement Agreement between Mr. Ruud and WHC which you are requesting does not allow disclosure of terms and conditions; thus, we are unable to provide it to you." Despite the specific wording of the settlement provisions of some of the statutes involved, WHC's counsel asked the Secretary to dismiss the case "without further delay."

[3] The ALJ found that Robert Gelman, WHC's quality assurance manager, retaliated against Ruud because of Ruud's testimony before a United States Congressional subcommittee addressing Gelman's lack of qualifications. The ALJ stated: "Any person who was not affected by a criticism like that leveled by Ruud in his Congressional testimony would be a candidate for sainthood. My observation of Gelman and my review of the record lead me to conclude that he is not such a candidate." R. D. and O. at 89 (footnotes omitted). As an example, the ALJ cited Gelman's "resistance to a stop-work order after presentation of an alarming audit . . . ." *Id.* at n.10. The ALJ found Gelman's denial of animus to be "an exercise in self delusion." *Id.*

[4] WHC contracted with the DOE to perform operations and engineering services at that facility. The DOE remained responsible for overseeing the activities of contractors to ensure adequate public safety and health. Ruud was employed as a nuclear quality assurance auditor and senior engineer. Simpkin was employed as a quality assurance inspector and examiner.

[5] Simpkin, who was not laid off, complained of harassment. Prior to the 1987 congressional hearings, Simpkin consistently had received outstanding performance ratings. Following the hearings, he received a written reprimand which subsequently was found by the DOE to have been unjustified. In meeting with Simpkin, a WHC executive characterized the congressional subcommittee as "adversarial" and interested only in "shutting Hanford down." Simpkin was told that he "had gone outside the system" and that he could cease cooperating with the subcommittee "at any time." Simpkin's mail and telephone calls were screened by WHC. The subcommittee chairman requested that Simpkin provide answers to written questions, some of which required consultation with a co-worker. WHC's general counsel admonished Simpkin that "it would not be appropriate to divert the time and attention of other employees from their assigned responsibilities to work on this matter." A supervisor directed Simpkin that the questions should be answered on his own time. Simpkin was removed from a panel established to review a testing program because his persistence in raising safety, health and environmental concerns was "a source of irritation" to WHC. WHC removed Simpkin from the job of correcting problems and did not assign him any replacement duties. CX 10 at 500, 559-560, 586-588.

[6] The Governor's party included representatives of the National media -- in particular Connie Chung. Hearing Transcript (T.) 71-73.

[7] The ALJ found that "[t]he corporate connection between WHC and WSRC is close enough to attribute the actions of one corporation to the other for purposes of whistleblower protection." R. D. and O. at 91. We agree as discussed *infra.*

[8] Larry McCormack, a WHC attorney who had participated in Ruud and Simpkin's settlement negotiations with WHC, also was employed by WSRC. Former WHC president William Jacobi managed the Gold Coast School for Environmental Excellence (GOCO) in South Carolina. Operated by Westinghouse Electric Corporation, the school was created to train Westinghouse government operations employees in environmental matters. CX 135 at 45. Ruud was engaged in producing technical training modules for the school. R. D. and O. at 22. Beginning in 1989, Jacobi was employed by Westinghouse Electric Corporation as vice president of the government operations business unit and served on WSRC's board of directors. CX 135 at 31, 42-45.

[9] Wiedrich testified:

> [Ruud] was physically escorted off site, which is extraordinarily unusual. . . . [T]here are a lot of people who have badges past their contract term and are not escorted off site and continue to go on and off site as long as their badge is active. . . . I know of badges for a fact that were handed in and were not terminated for a year and a half, so it was somewhat bizarre . . . the way he was escorted off site.

CX 148 at 86.

[10] Not all WSRC managers shared Wise's and Samuels's animus. Thomas Anderson, WSRC vice president and a general manager, was emphatic in his commitment not to discriminate. CX 150A at 59-60.

[11] Since the 1990-1991 retaliation at the Savannah River facility had not yet occurred, that portion of the complaint was not settled as the result of the 1988 negotiations.

[12] The exception permitting Ruud to respond to a lawful subpoena does not save the restriction. Not all regulatory agencies possess the authority to issue subpoenas.

[13] The Nuclear Waste Policy Act required the Department of Energy (DOE) to provide a repository for high level nuclear waste. The BWIP was implemented "to determine the properties and extent of the basalt [on the Hanford reservation], its permeability, the ground water flows . . . and to evaluate whether it was a suitable site" for a repository. R. D. and O. at 38.

[14] Fed. R. Civ. P. 23(e) is analogous. A court is not authorized to require the parties to accept a settlement to which they have not agreed. Rather, the court may (1) accept the proposed settlement, (2) reject the proposed settlement and postpone the trial in order to determine whether a different settlement can be achieved or (3) decide to try the case. *Evans v. Jeff D.,* 475 U.S. at 726-727.

[15] Even if improper, a threat does not constitute duress if the victim possesses a reasonable alternative to the threatened action and fails to avail himself of the alternative. For example, a party to a claim against it may threaten to file a court action unless the claimant discharges the claim. Because defense to the threatened action is a reasonable alternative to agreeing to discharge the claim, the threat does not constitute duress and the agreement is not voidable. In contrast, if the threatened court action would cause severe financial loss or irreparable injury, the threat may constitute duress and any agreement to discharge the claim may be voidable.

[16] The ALJ found that because of the agreement's integration clause, McCormack's implied "oral commitment not to affect Complainant's employability adversely" was not binding and that Ruud did not in fact rely upon it. R. D. and O. at 76. To the contrary, we find that McCormack's oral commitment constituted a statement of intent at the time of settlement and that Ruud actually and reasonably relied on the statement. Oral assertions are relevant regardless of whether they are legally binding. Restatement §159. A misrepresentation, *i.e.,* a false assertion, may consist of spoken or written words. The falseness of a statement depends on the meaning of the words in all of the circumstances, including what may be inferred from the words. An assertion may be inferred from conduct. Concealment or non-disclosure may constitute misrepresentation. The "Personnel File" provision of the agreement tracks McCormack's commitment. The agreement obligated WHC to expunge negative comments from employment files and to provide prospective employers with recommendations "of at least a neutral tone and quality." CX 60 at 2, par. 6. Continued employment with RI-TECH required a neutral employment recommendation, and the act of "forc[ing] Ruud out of his job with ... RI-

TECH," R. D. and O. at 93, because of whistleblowing activities was not grounded on such a recommendation. On the subject of reliance, the ALJ stated: "Indeed, Complainant acknowledged that he did not rely on any promises made by WHC outside the settlement agreement because, in light of what he believed to be false statements to the press and to Congress, he did not trust WHC management." *Id.* at 76. Ruud trusted WHC sufficiently to enter into the settlement, however. Indeed, the finding of absence of reasonable or actual reliance contradicts another ALJ finding that "[a]t the time of the agreement, Ruud did not have any indication that WHC was not going to follow the terms of the settlement." *Id.* at 20.

[17] A nonfraudulent misrepresentation does not render an agreement voidable unless it is material. In contrast, materiality is not essential if the misrepresentation is fraudulent. A party who nonfraudulently misrepresents an apparently unimportant fact would not reasonably expect the assertion to induce assent, while "a fraudulent misrepresentation is directed to attaining that very end . . . ." Restatement (Second) of Contracts §164(b). The materiality criterion may be met either if the provision likely would induce a reasonable person to manifest assent or if the maker knows that for a special reason the provision likely would induce a particular recipient to manifest assent.

[18] The court stated:

> [C]ourts naturally are concerned lest every breach of contract be levered into fraud by the too-facile expedient of asking the jury to infer from the fact that the defendant did not perform his promise that he never intended to perform it. So the rule has grown up that nonperformance is not enough to ground such an inference; there must be additional evidence of the defendant's intentions at the time he made the promise.

13 F.3d at 1109.

[19] The Secretary of Labor addressed this issue in *Chase v. Buncombe County, N.C., Dep't of Community Improvement,* Case No. 85-SWD-4, Sec. Rem. Dec., Nov. 3, 1986. There, a term of settlement "require[d] that Complainant's personnel file be purged of all mention of the alleged cause of his termination and the events leading up to said termination' and also require[d] that the County give, if requested, a neutral reference as to [Complainant's] performance as a County employee.'" Slip op. at 6. The employer subsequently refused to rehire the complainant for a job opening despite his superior qualifications. The city director of community improvement, who declined the complainant reemployment, had discharged him in the first instance, stating before witnesses that complainant never again would work for the county. The Secretary stated:

> The purpose of requirements for the purging of records and the providing of "neutral" references is to ensure that information in the hands of the employer does not adversely affect the employee in seeking future employment. Thus, where such information is the basis for the refusal to hire the employee, it cannot be said that the employer has purged its records and has given a "neutral" reference. The fact that the information is used to reject the employee in seeking

> reemployment by his former employer, rather than in applying for a position with a different employer, does not alter this conclusion.

Id. at 6-7.

[20] As in *Chase,* use of such information about previous employment to separate Ruud from prospective employment is not consistent with an agreement to purge employment records and provide neutral recommendations. Rather, information "in the hands of the employer" curtailed Ruud's employment.

[21] Because we are obligated under the whistleblower statutes to examine the terms of settlement before granting approval and because we "cannot approve a settlement that we have never seen," a refusal to disclose the settlement terms results in a remand for hearing. *McDowell v. Doyon Drilling Services, Ltd.,* Case No. 96-TSC-8, Rem. Ord., May 19, 1997, slip op. at 2; *Backen v. Entergy Operations, Inc.,* Case No. 96-ERA-18, Ord., Dec. 12, 1996; *Biddy v. Alyeska Pipeline Service Co.,* Case No. 95-TSC-7, Rem. Ord., Aug. 1, 1996. The possibility that, at hearing, a complainant may not prevail or a respondent may incur increased liability is the price the parties pay for disregarding the statutory provisions requiring submission of settlements for approval.

[22] Ruud testified that after publication of a newspaper article detailing whistleblowing activities at WHC, he was removed as instructor and denied access at WSRC. The ALJ overruled a relevancy objection and denied a motion to strike, ruling that the testimony tended to show animus. T. 298-299. The animus allegedly fueled the retaliation at the Savannah River facility *and* foreclosed any intention of abiding by the "Personnel File" term of the settlement agreement from its inception. Later, WHC objected to introduction of deposition testimony of certain WSRC witnesses. Ruud's counsel countered that WHC had refused to produce the witnesses at hearing and that he should be permitted to use the depositions if they contained relevant testimony. The ALJ ruled: "I think it's a distinction without a difference between the two corporations. I think the representation, for all practical purposes, involved in this case [is] the same." T. 677-678. These exchanges represent the only challenges to the testimony about retaliation at the Savannah River facility.

[23] In his Opening Brief before the Board, Ruud argued that he should be awarded front pay "calculated on the basis of his remaining expected professional life" and additional damages for emotional distress exacerbated by "continuing retaliation by Respondent even after Complainant's termination." Br. at 26-28. Accordingly, Ruud did not abandoned the claim of retaliation and violation at Savannah River advanced in prehearing filings and pressed at hearing.

[24] Indeed, even in its original form, the complaint may be read to allege continued retaliation by WHC managers, *e.g.,* failure to consider Ruud for recall, motivated by protected activity during Ruud's tenure at the Hanford reservation. We note that at the time of the hearing (and effective amendment) the portion of the complaint subject to the August 1988 settlement agreement remained pending because the terms had not yet been

approved by the Secretary or the Board and Ruud had challenged the bargaining process as impaired.

[25] Supplemental pleadings have proved so useful in facilitating efficient judicial administration that at least one Federal circuit has recommended that they be permitted as a matter of course. *Pratt v. Rowland,* 769 F. Supp. 1128, 1131 (N.D. Cal. 1991).

[26] The court in *Keith* explained that in the event of a *supplementation,* application of the "relation back" standard of Rule 15(c)(2) (relation back of *amendment* to date of original pleading) is not realistic. The standard for amendment requires that an unpleaded claim must "ar[i]se out of the conduct, transaction, or occurrence set forth . . . in the original pleading." Supplementation, however, permits a party to plead "transactions . . . which have occurred since the date of the pleading sought to be supplemented." Rule 15(d). "This textually negates the argument that a transactional test is required. While some relationship must exist between the newly alleged matters and the subject of the original action, they need not all arise out of the same transaction." *Keith v. Volpe,* 858 F.2d at 474 (noting that Rule 15(d) "makes no reference to any [transactional] test").

[27] Our disposition comports with Department of Labor precedent that complaints are informal filings which need not set forth all legal causes of action or allege all elements of a discrimination case and that the fact finder is not bound by the legal theories of any party in determining whether discrimination has occurred but must review the record in its entirety for purposes of the determination. *Ass't Sec. and Moravec v. HC & M Transportation, Inc.,* Case No. 90-STA-44, Sec. Dec., Jan. 6, 1992, slip op. at 4-5; *Monteer v. Casey's General Store, Inc.,* Case No. 88-SWD-1, Sec. Dec., Feb. 27, 1991, slip op. at 4-5; *Flener v. Cupp,* Case No. 90-STA-42, Sec. Rem. Dec., Apr. 9, 1991, slip op. at 4; *Perez v. Guthmiller Trucking Company, Inc.,* Case No. 87-STA-13, Sec. Dec., Dec. 7, 1998, slip op. at 32; *Nunn v. Duke Power Co.,* Case No. 84-ERA-27, Sec. Rem. Dec., Jul. 30, 1987, slip op. at 12 n.3; *Chase v. Buncombe County, N.C., Dep't of Comm. Improv.,* Case No. 85-SWD-4, Sec. Rem. Dec., Nov. 3, 1986, slip op. at 5; *Richter v. Baldwin Associates,* Case Nos. 84-ERA-9 *et. seq.,* Sec. Rem. Ord., Mar. 12, 1986, slip op. at 11. Our disposition also perpetuates the Department's general use of amendment and supplementation to promote administrative economy and convenience where fairness permits. *See, e.g., McNiece v. Northeast Nuclear Energy,* Case No. 95-ERA-18, Sec. Rem. Ord., Jul. 11, 1995; *Studer v. Flowers Baking Co. of Tenn.,* Case No. 93-CAA-11, Sec. Rem. Dec., June 19, 1995, slip op. at 1-2, 5-7; *Ass't Sec. and Wilson v. Bolin Assoc.,* Case No. 91-STA-4, Sec. Dec., Dec. 30, 1991, slip op. at 4-5; *Grizzard v. Tennessee Valley Authority,* Case No. 90-ERA-52, Sec. Rem. Dec., Sept. 26, 1991, slip op. at 3; *Chase v. Buncombe County,* slip op. at 4-5. *Contra, Gabbrielli v. Enertech,* Case No. 92-ERA-51, Sec. Dec., Jul. 13, 1993, slip op. at 9 n.3; *Gunderson v. Nuclear Energy Services, Inc.,* Case No. 92-ERA-48, Sec. Dec., June 19, 1993, slip op. at 7-8.